Rigid Pak Corp. *and* Union de Tronquistas de Puerto Rico, Local 901, International Brotherhood of Teamsters. Case 12–CA–152811

July 25, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND KAPLAN

On June 8, 2016, Administrative Law Judge Ira Sandron issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief. The Respondent filed cross-exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.[2]

We agree with the judge, for the reasons he states and as further explained below, that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union over its decision to transfer the production of its injection-molded products to another company, Alpla Caribe, Inc. We also agree with the judge, for the reasons he states, that the Respondent violated Section 8(a)(5) and (1) by not bargaining in good faith over the effects of that decision or the effects of the decision to close its blow-molding division, and by not providing the Union with notice and an opportunity to bargain over the performance of post-layoff bargaining unit work by non-unit employees. However, for the reasons discussed below, we disagree with the judge's conclusion that the Respondent violated the Act when it failed to bargain with the Union over its decision to close its blow-molding division.

I. FACTS

The relevant facts are largely undisputed. Briefly, the Respondent is a manufacturer and seller of plastic products. Since 1983, the Union de Tronquistas de Puerto Rico, Local 901, International Brotherhood of Teamsters (the Union) has represented the Respondent's production and maintenance employees at its Juncos, Puerto Rico facility. The Respondent and the Union have been party to successive collective-bargaining agreements. The most recent agreement was effective from 2010–2014, and included a provision against subcontracting unit work if that subcontract resulted in laying off regular employees.

Historically, the Respondent maintained two divisions–injection-molding and blow-molding–housed on different sides of its Juncos facility. In its injection-molding division, the Respondent manufactured open-head containers, lids, and crates. In the blow-molding division, the Respondent manufactured several types of plastic bottles. Employees worked interchangeably between the divisions. The companies that purchased the Respondent's blow-molded products were generally different from companies that purchased the injection-molded products.

On April 30, 2014, the Union requested to bargain a successor agreement. When the parties finally met several months later, Jose Carvajal, the Respondent's president and part owner, told the Union that the Respondent was in a bad financial situation and was exploring alternatives and that it was therefore asking for a one year extension of the current agreement without any increase in wages. He further stated that he would not ask the Union for concessions because labor costs were not the reason for the Respondent's financial predicament. The parties did not engage in further bargaining, and no contract extension was signed.

In late 2014, Carvajal considered several options for increasing sales, including exporting products, making alliances with competitors, and going into a new line of business. In October 2014, while exploring the possibility of expanding the Respondent's blow-mold line to include clear plastic bottles, Carvajal visited Alpla's

[1] The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We have amended the judge's conclusions of law consistent with our findings. We have also amended the remedy and modified the judge's recommended Order consistent with our legal conclusions, to conform to the Board's standard remedial language, to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010), and to provide for tax compensation and Social Security reporting in accord with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). In accordance with our decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in pertinent part 859 F.3d 23 (D.C. Cir. 2017), we have also modified the remedy and recommended Order to require the Respondent to compensate affected employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

blow-molding operation. Although Carvajal was considering Alpla as a supplier of raw materials for the new product, his examination of Alpla's operation convinced him that the Respondent could not continue the blow-mold operation, let alone expand it. As Carvajal testified,

> And an idea came to my mind, that I said, well, we cannot stay in the plastic bottle manufacturing business because we don't have the updated equipment and the cost structure to compete in the market. That was a given. We had to close that division of the company.

With respect to the injection-mold operation, Carvajal asked Alpla what it would charge for making injection-molded containers. After receiving an estimate, Carvajal determined that the Respondent could make a small profit and pay back its debt by paying Alpla to manufacture their containers. The Respondent and Alpla negotiated terms and, on February 12, 2015,[3] signed a supply agreement.

For injection-molded products, the agreement requires the Respondent to supply Alpla with the raw materials, molds, and machines that it owns; Alpla, in turn, agrees to provide the labor and facilities to manufacture the products. The Respondent also agrees to pay for the transportation of its machines to Alpla's facilities and to reimburse Alpla for any taxes and other public charges incurred in housing the Respondent's machines. The Respondent is also to pay for spare parts, replacement parts, and specialized technical support on the machines, while Alpla agrees to provide personnel for scheduled maintenance and repair work. Additionally, the Respondent agrees to supply or pay for packaging of the completed product, which bears the Respondent's name and logo. The Respondent pays Alpla for the manufactured products at a discounted rate.

As to blow-molded products, Alpla will manufacture products at its facility, with its own materials, machines, and workforce.[4] The agreement provides that the Respondent will purchase the finished blow-mold products it needs, at a price that can change monthly, based on the cost of raw materials and packaging.

For both products, Alpla also agrees to provide the Respondent with quality control reports, samples from each production run, and, upon reasonable notice, allow the Respondent to observe and inspect the manufacturing process. The parties further agree that prices for the products can change periodically based on labor and energy costs. The Respondent is responsible for arranging delivery of the products to its customers.[5]

The Respondent did not inform the Union of its negotiations with Alpla, or their agreement, until March 17. That day, Carvajal told the Union that he had to close the facility because the Respondent had suffered over $1 million in losses, that the Respondent was going to have Alpla manufacture its injection-molded products using the Respondent's machines, and that the Respondent was going out of the blow-molding business. On March 26, the Respondent met with the Union and advised it that it would cease its manufacturing operations the following day and that all unit employees would be laid off March 31. On March 31, the Respondent issued layoff notices to all unit employees informing them that March 31 would be their last day of work.[6]

In the months following the layoffs, the Respondent transferred its injection-molding machines to Alpla, and advertised its blow-molding machines for sale, successfully selling its largest one. At the time of the hearing, which was more than a year after the employees had been laid off, the Respondent continued to advertise itself as a manufacturer of injection and blow-molded products.[7] Alpla's only role in injection-molding was to manufacture products for the Respondent. The Respondent continued to sell its injection-mold products directly to the customers it supplied prior to the transfer of production to Alpla, and it resold blow-mold products to some of those same customers. As to blow-molded products, Alpla continued to supply multiple customers, including the Respondent.

Although the Respondent arranges for most of the products to be delivered directly from Alpla to its customers, some of its injection-molded products are delivered to its former manufacturing facility for pickup by small customers. Those products are handled by employees of Laser Products, Inc., which Carvajal also heads; prior to its contract with Alpla, this work was performed by the Respondent's bargaining unit employees.

[3] All dates are in 2015 unless otherwise indicated.

[4] We find merit in the Respondent's exception that the judge made a factual error, and find that the supply agreement does not state that Alpla would print the Respondent's logo on the blow-molded products.

[5] We find merit in the General Counsel's exception that the judge made a factual error, and find that the Respondent contracts directly with trucking companies for the delivery of its products that Alpla manufactures.

[6] As found by the judge, following the March 31 layoff, nonunit employees performed residual unit work at the Juncos facility in April and May.

[7] We disagree with the Respondent's exception to the judge's finding that the Respondent continues to advertise as a manufacturer of both injection and blow-molded products. The Respondent and the General Counsel submitted a joint stipulation where the parties agreed that GC Exhs. 17–19 depicted the Respondent's website, and we find that the judge correctly relied on those exhibits to make his finding.

II. THE JUDGE'S DECISION

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act when it failed to provide the Union with adequate notice and an opportunity to bargain over the decision to contract out injection-mold and blow-mold unit work and lay off unit employees.[8] Analyzing the Respondent's changes to its injection-mold and blow-mold operation, the judge found that the nature of the Respondent's business remained substantially unchanged after its agreement with Alpla, and, therefore, the decision was properly characterized as subcontracting rather than a partial closing. Thus, the decision and its effects were subject to mandatory bargaining per *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964). The judge noted that the Respondent did not go out of business; it remained an active participant in the production of injection-molded products, owned the machinery that manufactured the product, and continued to sell the product directly to the customers it served prior to its transfer of production to Alpla. As for blow-molding, the judge acknowledged that the Respondent had ceased producing that product, had sold one of its machines, and advertised its remaining equipment for sale. Nonetheless, the judge found that even if there had been a partial closure, i.e. a closure of the Respondent's blow-mold operation, because unit employees had worked interchangeably between the two divisions, bifurcating the two operations when assessing a bargaining obligation would be infeasible and unworkable. To remedy these violations, the judge's recommended Order requires the Respondent to, upon request, bargain with the Union over its decision to subcontract injection-molded and blow-molded unit work to Alpla and its effects, and to award laid off employees a limited backpay remedy pursuant to *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). The judge did not recommend restoration of the status quo, the traditional make-whole remedy for decisional bargaining violations, finding that requiring the Respondent to restore its injection-mold and blow-mold operations would place an unreasonable hardship on the Respondent.

III. DISCUSSION

Although we agree with the judge that the Respondent was obligated to bargain with the Union over the decision to subcontract its injection-molding work, we find, under the particular circumstances of this case, that this decisional bargaining obligation did not extend to its blow-molding operation. The facts regarding the two divisions substantially differ. Historically, the Respondent utilized separate equipment and processes to manufacture different types of products in each division.[9] Since the layoffs, the Respondent continues to be involved in the manufacture of injection-molded products; it has, however, abandoned blow-molding manufacturing.

As for injection-molding, the Respondent continues to provide the raw materials, molds, and machines, and instructs Alpla on what products to manufacture. The Respondent also agrees to pay for spare parts, replacement parts, and specialized technical support on the machines, and has agreed to reimburse Alpla for taxes or other charges it may incur in housing them. The finished injection-molded products all bear the Respondent's name and logo, and the Respondent, upon notice, can visit Alpla and inspect the manufacturing of its products. Once Alpla employees make the products, the Respondent arranges for the packaging and for the products to be delivered to the Respondent's customers. In addition, some of the products are sent to the Respondent's Juncos facility where they are available for pick up by small customers, and are handled by Laser's workforce rather than unit employees, who had performed the same function prior to the transfer of the manufacturing work. Finally, at the time of the hearing, the Respondent was the sole customer of Alpla-made injection-mold products, which the Respondent then sold to the same customers who had purchased the product prior to the transfer of work to Alpla.

Considering these facts, we find that there has not been so significant a change in the scope and direction of the Respondent's injection-molding business as to free the Respondent from its obligation to bargain with the Union over the decision to contract that work to Alpla. Thus, when Carvajal concluded that he could not maintain his current bottle manufacturing business, he decided that the injection-mold process and product remained viable, and continued to sell the product, with the manufacture of the product performed by Alpla. We find that the decision was subject to mandatory bargaining under our *Fibreboard* precedent. See, e.g., *O.G.S. Technologies, Inc.*, 356 NLRB 642, 645 (2011) ("Before and after the [contracting] decision, OGS produced and supplied brass

[8] The judge also found that the Respondent violated 8(a)(5) by transferring bargaining unit work to nonunit employees after March 31, 2015 without providing the Union notice and the opportunity to bargain.

[9] The Respondent had four machines in its injection-molding division and five in its blow-molding division, the largest of which was a five-mold bleach bottle machine that was connected by a conveyor belt to Laser, Inc., a neighboring bleach-producing company. Each division used its own molds and resins, and had its own "supplier," a unit employee who added color to the machines and moved the finished products out of the production area.

buttons to customers."); *Bob's Big Boy Family Restaurant*, 264 NLRB 1369, 1371 (1982) (after contracting out shrimp processing, the respondent continued in the same business, only with the processing work performed by the subcontractor's employees). As in *O.G.S.* and *Bob's Big Boy*, the Respondent continued in the same business and merely transferred the manufacturing work to a contractor. Indeed, as a practical matter, all the Respondent essentially did was substitute Alpla's employees for its own unit employees. Thus, although Alpla employees are used to manufacture the injection-molded products, the Respondent remains largely responsible for the other aspects of their production, and it is completely responsible for the sales of those products, all of which bear its name and logo. Accordingly, the Respondent was required to bargain with the Union over the decision to transfer its injection mold work.

We reject the Respondent's claims that bargaining could or would have harmed its business. As to the Respondent's claims that bargaining could have caused it to lose customers or jeopardized its negotiations with Alpla, we view them as speculative, and accord them little weight. We also give little weight to the Respondent's concerns that bargaining would have required it to breach its confidentiality agreement with Alpla. The Respondent could have avoided those concerns by negotiating with the Union over a nondisclosure agreement. Finally, as to the Respondent's argument that bargaining over the decision would have been futile—and thus presumably a burden—because labor costs played no role in its decision, we cannot conclude that is the case. The Respondent certainly appeared concerned with labor costs (notwithstanding its contrary assertions) when, within a year of contracting with Alpla, it specifically asked the Union to continue the collective-bargaining agreement without any wage increases. More importantly, we are not convinced that labor costs played no consideration, or could not have been a significant consideration, where, as discussed above, so much of the manufacturing operation remains the same, requiring the same type of labor that bargaining unit employees performed. Although we cannot say whether the Union and Respondent would have reached a successful agreement, it was necessary that the Union timely be provided this opportunity. See *Gunderson Rail Services, LLC*, 364 NLRB No. 30, slip op. at 2 (2016) (noting that "the Respondent could not claim to know what solutions the give-and-take of bargaining might have generated" and that the parties could have discussed the possibility of keeping a smaller operation).

We view the Respondent's actions surrounding its blow-molding operation differently. Unlike the decision to contract out its manufacture of injection-mold work to Alpla, the Respondent's decision to abandon blow-molding manufacturing involved a significant change in the scope and direction of its enterprise and was thus not subject to mandatory bargaining. Cf. *Torrington Industries, Inc.*, 307 NLRB 809, 810 (1992) (no change in the scope and direction where the respondent kept preparing concrete with the same raw materials); *O.G.S. Technologies*, supra, at 645. When evaluating its business options, the Respondent viewed Alpla's blow-mold equipment and operation, and determined that it could not proceed profitably with its current operation; nor could it afford the equipment or experienced personnel necessary to expand its blow-molded product line. As a result, the Respondent divested itself from the blow-mold manufacturing operation, sold its largest machine and placed the remaining machines up for sale. In its place, the Respondent contracted to purchase blow-mold products from existing blow-mold manufacturer Alpla, using Alpla's machines, molds, supplies and workforce. Unlike the injection-mold products, the Respondent's name and logo are not printed on the blow-mold products it purchases from Alpla and the Respondent is merely one of Alpla's blow-mold customers. Thus, as the Respondent plays no role in the manufacture of the blow-mold products, it made a significant change in this operation. Accordingly, we find that the Respondent was not obligated to bargain with the Union regarding the decision to cease producing blow-mold work.

For all these reasons, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with notice and an opportunity to bargain over the decision to subcontract its injection-molding work, but that it did not violate the Act by unilaterally closing its blow-molding operation.[10] However, the Respondent was obligated to provide the Union with notice and an opportunity to bargain over the effects of both decisions, which, as the judge correctly found, it failed to do.

Finally, although we agree with the judge that the limited *Transmarine* remedy is appropriate for employees

[10] We disagree with the judge's finding that bargaining would have been unworkable because unit employees had worked interchangeably between the injection-mold and blow-mold operations. Bargaining over which employees will be affected by layoffs is not uncommon for unions and employers. See, e.g., *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 677 (1981) (noting that "the order of succession of layoffs" is a mandatory subject of bargaining); *Good Samaritan Hospital*, 363 NLRB No. 186, slip op. at 2 (2016) (parties had bargained to implement layoffs based on seniority); *Waymouth Farms*, 324 NLRB 960, 963 (1997) (parties had bargained to implement layoffs based on employees' skill, ability, and performance), enfd. in part 172 F.3d 598 (8th Cir. 1999). We find that such bargaining was and is likewise possible here.

adversely affected by the Respondent's failure to meaningfully bargain over the effects of its decision to close its blow-mold operation, we do not agree with the judge that this limited remedy is likewise warranted for the injection-mold 'decision-bargaining' violation. It is well settled that restoration of the status quo is the appropriate remedy for decision violations, absent a showing that it would be unduly burdensome. See, e.g., *O.G.S. Technologies*, supra, 356 NLRB at 647; *Q-1 Motors Express, Inc.*, 323 NLRB 767, 768–769 fn. 10 (1997); *Torrington*, supra, 307 NLRB at 820. Here, although the judge concluded that restoration of the status quo would place an "unreasonable hardship" on the Respondent, this issue was not fully litigated.[11] And, in any event, the judge's conclusion assumed a restoration of the blow-mold division, which is more than we are requiring. Accordingly, we shall impose the traditional restoration remedy for the injection-mold decision violation. The Respondent will have the opportunity in compliance to introduce evidence to demonstrate that restoring its injection-mold operation would be unduly burdensome. See *IMI South, LLC, d/b/a Irving Materials*, 364 NLRB No. 97, slip op. at 7 (2016); *Q-1 Motors*, supra, 323 NLRB at 768-769 fn. 10.

AMENDED CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union de Tronquistas de Puerto Rico, Local 901, International Brotherhood of Teamsters (Union), is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following conduct, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(5) and (1) of the Act:

(a) Laying off unit employees on March 31, 2015, and subcontracting their injection-molding work without first affording the Union adequate notice and an opportunity to bargain over the decision and its effects.

(b) Failing to timely notify and meaningfully bargain with the Union over the effects of its decision to close its blow-molding operation.

(c) Transferring bargaining unit work at its Juncos facility after March 31, 2015, to nonunit employees without providing the Union with notice and an opportunity to bargain.

[11] Indeed, testimony on the Respondent's current financial situation was specifically curtailed at the hearing. See Tr. 173–174.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) of the Act by not bargaining with the Union over its decision to subcontract its injection-molding operation and the effects of that decision, we shall order the Respondent to restore the status quo ante, and give the Union notice and, on request, an opportunity to bargain regarding the decision to subcontract its injection-mold work. In addition, we shall order the Respondent to offer affected employees full reinstatement to their former jobs or to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make whole affected employees for any loss of wages and other benefits they may have suffered as a result of the Respondent's decision. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, we shall order the Respondent to compensate the affected employees for any adverse tax consequences of receiving lump-sum backpay awards, and file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee. *AdvoServ of New Jersey, Inc*., 363 NLRB No. 143 (2016). In accordance with our recent decision in *King Soopers, Inc*., 364 NLRB No. 93 (2016), enfd. in pertinent part 859 F.3d 23 (D.C. Cir. 2017), we shall also order the Respondent to compensate the affected employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

To remedy the Respondent's unlawful failure to bargain with the Union over the effects of its decision to close its blow-molding operation, we shall order the Respondent to bargain with the Union, on request, over the effects of its decision. As a result of the Respondent's unlawful conduct, certain unit employees have been denied an opportunity to meaningfully bargain through their collective-bargaining representative at a time when the Respondent might still have been in need of their

services and a measure of balanced bargaining power existed. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, we deem it necessary, in order to ensure that meaningful bargaining occurs and to effectuate the policies of the Act, to accompany our bargaining order with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violations and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent to pay backpay to the unit employees affected by this remedy in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as clarified by *Melody Toyota*, 325 NLRB 846 (1998).

Thus, the Respondent shall pay those unit employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of its decision to close its blow-molding operations; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the Union's subsequent failure to bargain in good faith.

In no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the Respondent closed its blow-molding operation to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner. However, in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be based on earnings which the unit employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. Additionally, we shall order the Respondent to compensate unit employees for any adverse tax consequences of receiving lump-sum backpay awards and to file a report with the Regional Director for Region 12 allocating backpay to the appropriate calendar years for each employee, in accordance with *AdvoServ of New Jersey, Inc.*, supra.

Because the Respondent assigned its unit employees interchangeably between its injection mold and blow-mold operations, and as we have found that the Respondent lawfully discontinued its blow mold operation, the identity of employees who will receive reinstatement and make-whole relief, rather than the more limited *Transmarine* effects remedy, is not currently known. We will afford the parties, at the Union's request, an opportunity to bargain over the identity of employees who will respectively receive either the make-whole or *Transmarine* remedies. Further, the Respondent may litigate in compliance whether it would be unduly burdensome to restore the status quo ante with respect to its injection-molding operation.

We also order the Respondent to make-whole unit employees for transferring bargaining unit work to nonunit employees at its Juncos facility after March 31, 2015, without providing the Union notice and an opportunity to bargain. We leave to compliance the determination of whether any negotiated agreement(s) or the remedies provided by the Respondent are sufficient to fully make whole affected employees for this transfer of unit work.

Finally, in view of the fact that the Respondent has laid off all bargaining-unit employees and the possibility that a workplace posting requirement will provide inadequate remedial notice, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of its former unit employees in order to inform them of the outcome of this proceeding.

ORDER

The Respondent, Rigid Pak Corp., Juncos, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off unit employees and subcontracting their injection-molding work without first affording the Union de Tronquistas de Puerto Rico, Local 901, International Brotherhood of Teamsters (the Union) adequate notice and an opportunity to bargain over the decision and its effects.

(b) Failing to timely notify and meaningfully bargain with the Union over the effects of its decision to close its blow-molding operation.

(c) Transferring bargaining unit work to nonunit employees at its Juncos facility without providing the Union with notice and an opportunity to bargain.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore the status quo ante by restoring to the Juncos facility all injection-molding work previously performed by bargaining unit employees.

(b) Notify and, on request, bargain with the Union over the decision to subcontract injection-molding work to Alpla, and the effects of that decision.

(c) Notify and, on request, bargain with the Union over the effects of its decision to close its blow-molding operation.

(d) Notify and, on request, bargain with the Union over using nonunit employees to perform bargaining unit work at its Juncos facility.

(e) Offer the employees laid off as a result of the decision to subcontract the injection-molding work full reinstatement to their former jobs or to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(f) Make whole the employees laid off as a result of the decision to subcontract the injection-molding work in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(g) Pay the employees affected by the failure to timely notify and meaningfully bargain with the Union over the effects of the decision to close the blow-molding operation in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(h) Make employees whole for any loss of earnings and other benefits suffered as a result of transferring bargaining unit work at its Juncos facility after March 31, 2015 to nonunit employees without providing the Union with notice and an opportunity to bargain, plus interest.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days after service by the Region, post[12] at its facility in Juncos, Puerto Rico, copies of the attached notice marked "Appendix," in Spanish and English, and mail a copy thereof to each bargaining unit employee laid off on March 31, 2015. Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 31, 2015.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. July 25, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

Marvin E. Kaplan, Member

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT lay you off and subcontract injection-molding unit work without first affording the Union de Tronquistas de Puerto Rico, Local 901, International Brotherhood of Teamsters (the Union) adequate notice and an opportunity to bargain over the decision and its effects.

WE WILL NOT fail to timely notify and meaningfully bargain with the Union over the effects of our decision to close our blow-molding operations.

WE WILL NOT transfer bargaining unit work at our Juncos facility to nonunit employees without providing the Union with notice and an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL restore the status quo ante by restoring to the Juncos facility all injection-molding work previously performed by bargaining-unit employees.

WE WILL notify and, on request, bargain with the Union over our decision to subcontract injection-molding work to Alpla, and the effects of that decision.

WE WILL notify and, on request, bargain with the Union over the effects of our decision to close our blow-molding operation.

WE WILL notify and, on request, bargain with the Union over using nonunit employees to perform bargaining unit work at our Juncos facility.

WE WILL offer the employees laid off as a result of our decision to subcontract the injection-molding work full reinstatement to their former jobs or to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole the employees laid off as a result of our decision to subcontract the injection-molding work for any loss of earnings and other benefits resulting from their layoff, less any net interim earnings, plus interest, and WE WILL also make such employees whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL pay unit employees affected by our failure to timely notify and meaningfully bargain with the Union over the effects of our decision to close our blow-molding operation in the manner set forth in the Decision and Order of the National Labor Relations Board, with interest.

WE WILL make employees whole for any loss of earnings and other benefits suffered as a result of transferring bargaining unit work at our Juncos facility after March 31, 2015, to nonunit employees without providing the Union with notice and an opportunity to bargain, plus interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

RIGID PAK CORP.

The Board's decision can be found at www.nlrb.gov/case/12-CA-152811 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Ayesha K. Villegas Estrada, Esq., for the General Counsel.
Bayoan Muniz-Calderon & Ian P. Carvajal, Esqs. (Saldana Carvajal & Velez-Rive, PSC), for the Respondent.
Jose Carreras, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. This matter arises out of a complaint and notice of hearing (the complaint) issued

on January 29, 2016, against Rigid Pak Corp. (the Respondent or the Company), stemming from unfair labor practice charges filed by Union de Tronquistas de Puerto Rico, Local 901, International Brotherhood of Teamsters (the Union).

Pursuant to notice, I conducted a trial in San Juan, Puerto Rico, on April 20 and 21, 2016, at which I afforded the parties full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

ISSUES

1. Did the February 12, 2015[1] contract between the Respondent and Alpla Caribe, Inc. (Alpla), which led to the March 31 layoff of all 28 unit employees, create a subcontracting situation coming under *Fibreboard Paper Products Corp. v.NLRB*, 379 U.S. 203 (1964); or a partial closing governed by *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981)?

2. Depending on the answer to that, did the Respondent violate Section 8(a)(5) and (1) by not affording the Union an adequate opportunity to bargain over the decision to lay off unit employees and/or its effects?

3. Since on about March 31 has the Respondent used employees of Laser Products, Inc. and a former supervisor to perform unit work at its facility, without affording the Union notice and an opportunity to bargain?

4. If the Respondent's conduct violated the Act, is the appropriate remedy restoration of the status quo ante; or an effects bargaining remedy as per *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), and making unit employees whole for later unit work performed by nonunit employees?

WITNESSES AND CREDIBILITY

The General Counsel called Rafael Rosario (Rosario), the Union's vice president, who serviced the Respondent's unit employees; Brenda Rosario (Brenda Rosario), who was a production employee and shop steward; and Jose Carvajal, the Respondent's president and part-owner, as an adverse witness under Section 611(c). The Respondent called Carvajal as its sole witness in its case in chief.

Most of the pertinent facts in this case are stipulated.[2] All three witnesses seemed generally candid, and I have no reason to doubt their truthfulness as far as relating conversations. Both Carvajal and Brenda Rosario appeared to have detailed recall; Rosario somewhat less so. Their testimony generally did not differ much in substance. I note that Carvajal was quite consistent on 611(c) and direct examination on what was said in his discussions with union representatives.

The Respondent's counsel agrees with my assessment that Brenda Rosario was a credible witness but contends that Rosario was only partially credible because he contradicted himself on various occasions, and that on one point, Carvajal's testimony should be credited over his (R. Br. 3). According to the General Counsel, Carvajal's "self-serving" and unsupported testimony that labor costs were not a factor in deciding to close was incredible (GC Br. 23–24). The briefs do not otherwise address credibility per se.

[1] All dates hereinafter occurred in 2015 unless otherwise indicated.

[2] See Jt. Exhs. 1–3.

FACTS

Based on the entire record, including testimony and my observations of witness demeanor, documents, and stipulations, as well as the posttrial briefs that the General Counsel and the Respondent filed, I find the following:

JURISDICTION

The Respondent is a corporation with an office and place of business in Juncos, Puerto Rico. Prior to March 31, it engaged at its facility in Juncos (the facility) in manufacturing and distributing two types of containers and closures, injection-molded and blow-molded. The Respondent admits to the Board's jurisdiction,[3] and I so find.

The Parties Collective-Bargaining History Prior to March

Since in about March 1983, the Respondent has recognized the Union as the exclusive collective-bargaining representative of its employees in the following unit at the facility:

> All production and maintenance employees, including turners; excluding all office and clerical employees, production controllers, electricians, special project technicians, professionals, guards, and supervisors as defined in the Act.

Such recognition was embodied in a series of collective-bargaining agreements, the most recent of which was effective by its terms from August 1, 2010, to July 31, 2014.[4] Relevant provisions of the agreement are:

> (1) The management rights to decide "[p]roducts to be manufactured and their prices," and "[m]ethods, procedures, and the means of manufacturing, distribution and management." Article IV.
>
> (2) "The Company shall not subcontract any work that is normally done by [unit employees] if that subcontract[sic] results in laying off regular employees who are working at the time of that subcontracting." Article XX, section A(1).

The Respondent does not argue that any provisions in the agreement amount to a waiver by the Union of its rights to negotiate about subcontracting. Rather, the Respondent contends that the decision to enter into the agreement with Alpla was not subcontracting but a change in the scope and direction of the enterprise, supported by the management-rights clause (R. Br. 20). I also note that the General Counsel does not allege that the Respondent's actions in this case were motivated by antiunion considerations.

By letter and email dated April 30, 2014, Union Secretary-Treasurer Alexis Rodriguez Normadia (Rodriguez) requested that Carvajal negotiate for a new collective-bargaining agreement.[5]

Not until September (according to Carvajal) or December (according to Rosario and Brenda Rosario) did the parties meet

[3] GC Exh. 1(g) at 1; Jt. Exh. 1 at 2.

[4] See GC Exh. 2, portions of the agreement. Part "A" of the exhibit is the original version in Spanish, with the English translation as part "B." The same holds true of other exhibits originally in Spanish.

[5] GC Exh. 3.

on the subject.[6] Carvajal was present for the Company; and Rosario and delegates (shop stewards) Brenda Rosario, and David Rodriguez attended for the Union. Carvajal, Rosario, and Brenda Rosario gave generally similar and not inconsistent versions of what occurred.

Carvajal stated that the Company was in a bad financial situation due to sales being down; that the Company had explored or was exploring alternatives, such as trying to get clients outside of Puerto Rico; and that he therefore was requesting an extension of the current collective-bargaining agreement for another year without any increases. He further stated that he would not ask the Union for concessions because the cost of labor was not the reason for the Company's economic situation and would not make a difference. Carvajal offered to show Rosario the Company's financial statements and financial information, but Rosario declined to see them. Rosario asked that if there was an increase in health insurance, the Company would absorb that, and Carvajal agreed. Rosario stated that the Union would take to its members Carvajal's proposal for an extension.

The parties held no further negotiations and never signed an extension agreement. Prior to March, the only further communications between Carvajal and Rosario occurred in passing, when Rosario was at the facility and Carvajal mentioned the Company's continued financial difficulties.

Respondent's Business Operation Prior to March 31

For many years, the Respondent manufactured plastic bottles made with high-density polyethylene through a blow-molding process, and open-head containers and lids and milk crates using high-density polyethylene through an injection-molding process.[7] Totally different equipment (machines, molds, and resins) were required for each of the processes, which were performed in separate areas or sides. No unit employees were specifically assigned to one side or the other; they worked on both sides and even could spend part of one shift on one side and part on the other, depending on where they were needed.

The number of unit employees reached about 100 at one time, but by March 31, there were only 28. They were machine operators, warehouse employees, or maintenance employees. Unit employees were responsible for all aspects of the process at the facility, from the manufacturing to the storing of both lines of products in the warehouse. Nonemployee independent truckers picked up the products and delivered them to customers.

Respondent's Financial Situation Prior to March

As a result of economic problems in Puerto Rico and declining sales, the Respondent experienced financial difficulties in the years immediately preceding 2015. The Respondent's Puerto Rico income tax return, filed on February 9, 2016, for the tax year from July 1, 2014, to June 30, 2015, shows a net operating loss of almost $903,000.[8] A financial statement prepared on December 18 by Luis B. Golzalez & Co., PSC, CPAs and consultants, shows the following:[9]

	Year ending June 30, 2014	Year ending June 30, 2015
Gross profit	$374,772	minus $226,262
Income from operations	minus $217,421	minus $836,408
Net loss	$275,322	$908,465
Advances from Laser Products, Inc. (no interest)	$700,000	$1,500,000
Dividends declared and paid	$137,320	$83,010

Carvajal looked for ways to increase sales, including exporting out of Puerto Rico; making alliances with competitors; or going into new products, specifically clear plastic bottles for which there was a big market in Puerto Rico. He determined that exporting was not feasible because the Company faced major competition in the continental United States and Latin America. Alpla was a major supplier of raw material for such bottles, and in October 2014, Carvajal met with Richard Lisch, Alpla's general manager, to discuss the possibility of the Respondent's buying raw material from Alpla to blow clear plastic bottles. After observing Alpla's operation and reviewing his situation, Carvajal came to the conclusion that the Company had neither the capital nor the human resources necessary to buy and efficiently run the sophisticated equipment needed. He further determined that the Company could not stay in the plastic bottling manufacturing business because it did not have the updated equipment and cost structure necessary to compete. Thereafter, he discussed with Lisch the alternative of having the Respondent's product produced at Alpla's facility.

Respondent's Agreement with Alpla

After negotiations, the Respondent and Alpla ultimately signed a supply agreement on February 12.[10] By its terms, the Respondent delivered its injection-molding equipment (machines and molds) to Alpla's plant but has remained the owner of that equipment; Alpla is wholly responsible for manufacturing, packaging, storing, and delivering the containers to the Respondent's customers under the Respondent's logo;[11] and the Respondent pays Alpla for those products at a discounted rate. The Respondent provides the raw materials for the manufacturing. The Respondent also purchases blow-molding products with its logo, for which Alpla provides the raw materials and machines. Alpla prepares and submits to the Respondent quality control records and reports, and a reasonable number of samples from each production run of products for quality pur-

[6] In his affidavit, Rosario gave the month of the meeting as "around August." No one took minutes of the meeting or memoralized it in writing, so that when it occurred and what was said has to be based solely on witness testimony. In any event, whether the meeting took place in August, September or December is immaterial.

[7] See GC Exhs. 18, 19 (blow-molded products and injection-molded products, respectively, manufactured in 2004); and R. Exh. 6, showing blow-molding machines for sale in November, with photographs of the products. Some of them were still manufactured in 2015.

[8] R. Exh. 1. Wages for that period were approximately $363,000. Id. at 5.

[9] R. Exh. 2.

[10] GC Exh. 4. See also Jt. Exh. 3 (injection-molding products that the Respondent would purchase: lids, pails, and milk crates).

[11] The Company's name is embossed in the molds and therefore on every container.

poses. The Respondent has the right, upon reasonable notice, to send one or more of its employees to observe and inspect the manufacturing, warehousing, and other facilities that Alpla uses to produce, package, store, and ship products. Carvajal has been to Alpla's plant four times in the past year.

As a result of the agreement, the Respondent planned to entirely cease manufacturing operations at its facility and to sell the blow-making equipment. Carvajal determined that the price Alpla would charge for manufacturing containers and selling them to the Company would enable the Company to resell them at small profit and pay back its debt.

Carvajal testified that he wanted to keep their negotiations and the agreement confidential prior to the cessation of manufacturing operations so that his business competitors would not try to take away his customers in advance of the closing.

Respondent's Notification to the Union

Carvajal testified that it took him about 2 weeks after he signed the contract, or until late February, to determine how much time was needed to transfer the machines and have them operating at Alpla to avoid any interruption in supplying the Respondent's customers.

I credit Carvajal's uncontroverted testimony as follows. On March 5, he called Union Secretary Treasurer Rodriguez and requested a meeting. Rodriguez did not answer the phone. Carvajal had heart surgery on March 6 and called Rodriguez again on March 9. He told Rodriguez that it was "urgent" that they sit down and meet but did not specify why because he "didn't want to advance any information" concerning the shutdown.[12] Rodriguez stated that the first date he had available was on March 17.

Carvajal and Rodriguez met for about an hour at a restaurant on March 17. Carvajal started by letting Rodriguez know that he was closing the plant because the Company's sustained losses were over $1 million; that the Company's injection-molding equipment would be moved to Alpla, which would manufacture the injection-molded products; and that the Company would go out of the blow-molding business and sell its blow-molding equipment. This was the first knowledge the Union had of the Alpla agreement and resulting plant closing.

Rodriguez asked if Carvajal had any money for a severance package, and Carvajal replied no. Carvajal asked for Rodriguez' help in informing employees of the closing, and Rodriguez asked if he could meet with them at the facility. Carvajal agreed. Rodriguez said that he would contact Rosales and the union delegates to arrange to assemble the employees, and would call Carvajal back about this.

In testifying on 611(c) examination, Carvajal said nothing about giving Rodriguez a date for the closure; however, in later direct examination, he testified that he told Rodriguez the closing would be "by the end of March."[13] I believe it highly likely that Carvajal either mentioned a specific time frame for the closing or that Rodriguez would have asked for, and been provided, with that information. It is highly implausible that the date would not have been brought up in their conversation in light of the momentous impact on unit employees. Accordingly, I find that Carvajal informed Rodriguez that the closure would occur by the end of March.

Carvajal, Rosario, and Brenda Rosario all testified about meeting after March 17 regarding the plant closure. Carvajal and Brenda Rosario testified about attending only one meeting, but Rosario testified that there were two. Carvajal and Rosario gave a meeting date of March 26, whereas Brenda Rosario gave it as April 5. Based on the contents of Carvajal's March 30 letter to Rodriguez,[14] I find that one meeting was held on March 26.

On March 26, Carvajal and Eric Romero, the Company's controller, met with Rosario and Union Stewards Brenda Rosario and David Rodriguez in the facility's conference room. Carvajal repeated what he had told Rodriguez on March 17. He stated that the last day of manufacturing operations would be the following day, March 27, and that the last work day for unit employees would be March 31. Rosario asked if it would be a total or partial shutdown, to which Carvajal replied that it was total, and even the official clerical employees were going to be let go. Rosario asked whether Carvajal would consider rehiring laid-off employees if he reopened within the next 2 years, and Carvajal said yes but that he had no plans to reopen. Romero asked if Carvajal could give a bonus due to the closing, but he said no because he did not have the money. Rosario asked if the Company could advance the Christmas bonus instead of waiting until December, and Carvajal agreed to calculate the amounts and hand them over at closing. Rosario also asked for liquidation for accrued sick leave and vacation leave, and he and Carvajal agreed on a date on which the Company would pay those amounts. Carvajal further stated that the employees would have a month of paid medical insurance after the plant closed because the premiums had already been paid.

By letter and email of March 30 to Rodriguez, Carvajal confirmed some of what was said about the closing at their March 17 meeting and at his March 26 meeting with Rosario.

On March 31, the Respondent issued layoff letters to all unit employees.[15] The only written agreement that the parties reached regarding the closure was a stipulation that Carvajal and Rosario signed on April 15, concerning calculation of the Christmas bonus up until the date of the closing.[16]

Respondent's Operation after March 31

As per its agreement with Alpla, the Company paid to move all four of its injection-molding machines and its injection molds to the Alpla facility, on April 15, 28, and May 29.[17] The Respondent sold its biggest blow-mold machine, used to manufacture bleach bottles, for $120,000 on about July 1; its four remaining blow-mold machines and 26 molds, which are still at the facility, are currently on the market for sale.[18]

Since March 31, the Respondent has purchased both injec-

[12] Tr. 190.

[13] Tr. 193.

[14] GC Exh. 5. The reference therein to "Rafael Rodriguez" was an error.

[15] See GC Exh. 8 (sample letter).

[16] GC Exh. 7.

[17] See GC Exhs. 20–22.

[18] See R. Exhs. 3, 6, 7.

tion-molded and blow-molded products from Alpla.[19] Alpla delivers approximately 95 percent of the products that it manufactures for the Respondent directly to the Respondent's customers; the remainder is delivered to the facility, for pickup by the Respondent's smaller customers or for emergencies. Alpla contracts directly with the trucking companies that make the deliveries.

Some inventory remained at the facility after March 31. The Respondent had nonunit employees move left over inventory to containers, for delivery to customers. These included Edward Rivera Mojica, who was working as a Company supervisor in the warehouse in March. No raw materials are delivered to the facility; the raw materials that the Respondent buys for its injection-molded products are delivered directly to Alpla.

Carvajal is president of Laser Products, Inc. (Laser), which owns the property on which the facility is located and was one of Respondent's customers. Laser is engaged in packaging household chemicals and producing a bleach. It now has an account with Alpla, and the Respondent no longer provides it with any product. Laser uses the facility's warehouse for its finished products. The General Counsel does not contend that Laser is an alter ego of, or a successor employer to, the Respondent.

Carvajal had Laser employees perform unit work at the facility the weeks ending April 19 and May 3.[20] In the first week, six employees worked for a total of 72 hours and were paid $830.84; in the second week, eight employees worked for a total of 275 hours and were paid $2994. They produced both injection containers and blow bottles, and some of them loaded trailers. The Respondent never gave the Union prior notice of this.

On May 18, the Union picketed the facility. Carvajal invited Rodriguez, Rosario, and Brenda Rosario inside. Rodriguez asked why he was still in production when he had allegedly closed the business, and stated that unit employees should do that work. Carvajal denied this, saying that he had to turn on the machines in order to keep them in working condition before moving them out of the building. He explained that he did not call unit employees because it would have been a nuisance for them due to the small amount of hours that they have to report to the unemployment office. Brenda Rosario pointed out that there was still product in the plant and that moving product inside the facility was unit work.

That same day, Rodriguez sent a follow-up letter and email to Carvajal, confirming what the Union had observed as to production work and movement of stored merchandise; reiterating that such was unit work; requesting discussions about resuming operations with unit personnel; and demanding that unit employees be paid for the work that was performed by nonunion personnel.[21]

Currently, three Laser employees, including Mojica, handle product at the facility. Approximately 90 percent is household chemicals for Laser; the remainder is injection-mold products that are manufactured by Alpla for the Company and delivered for pickup by small customers. No manufacturing is done at the facility. The Company presently employs three administrative employees, who work in accounting; Carvajal's nephew; a messenger; a handyman, who does maintenance and cleaning; and Carvajal. These employees worked for the Company before March 31.

Prior to the closing, the Respondent's utility and maintenance costs were nearly $2 million a year. As a result of closing the manufacturing operation at the facility, the Respondent has greatly reduced maintenance, infrastructure, and utility costs, and is no longer responsible for defective products.

The Respondent continues to advertise as a manufacturer of both injection-molded and blow-molded products. See GC Exhs. 17–19.

Analysis and Conclusions

The Appropriate Analytical Framework

The threshold issue is how to properly characterize the nature of the change in the Respondent's operation because that will determine the scope of the Respondent's bargaining obligation. The General Counsel take the position that a subcontracting analysis is appropriate and that the Respondent had an obligation to bargain over both the decision and its effects, as per *Fibreboard Corp. v. NLRB (Fibreboard)*, 379 U.S. 203 (1964) (GC Br. 16, et. seq.). On the other hand, the Respondent contends that it closed its operations and changed the scope and direction of its business, so that its bargaining obligation was limited to bargaining over the effects but not over the decision itself, under *First National Maintenance Corp. v. NLRB (First National)*, 452 U.S. 666 (1981) (R. Br. 14, et. seq.).

Section 8(d) of the Act provides than an employer has the obligation to bargain with respect to wages, hours, and other terms and conditions of employment. In *Fibreboard,* above at 210, et. seq., the Court determined that contracting out of unit work that unit employees are capable of continuing to perform comes under Section 8(d) and is therefore a mandatory subject of bargaining. The Court noted, id. at 213–214:

> The facts of the present case illustrate the propriety of submitting the dispute to collective negotiation. The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business.

The Court also emphasized that the respondent's desire to reduce labor costs was at the base of the employer's decision to subcontract and that this was a matter "peculiarly suitable for resolution within the collective bargaining framework." Ibid.

The Court clarified that its decision was limited to subcontracting where bargaining unit employees are replaced with those of an independent contractor to do the same work under similar conditions of employment ("Our decision need not and does not encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy." Id. at

[19] See GC Exhs. 12–16.

[20] See GC Exhs. 10, 11.

[21] GC Exh. 9.

215).

In *First National*, above, the Court discussed entrepreneurial management decisions involving a change in the scope and direction of the enterprise that have a direct impact on employment but have as their focus only economic profitability wholly apart from the employment relationship. The Court, balancing the benefits to be derived from collective bargaining with management's need for freedom to make decisions necessary to run a profitable business, set forth the following test:

> [I]n view of an employer's need for unencumbered decisionmaking, bargaining over managements decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.

452 U.S. at 679. In addressing a partial shutdown for purely economic reasons, the Court distinguished *Fibreboard* and concluded, id. at 686 (emphasis in original):

> [T]he harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business for purely economic reasons outweighs the incremental benefit that might be gained through the union's participating in making the decision, and we hold that the decision itself is *not* part of § 8(d)'s 'terms and conditions'. . . ."

The Court noted that the employer had no intention to replace the discharged employees or to move the operation elsewhere, that the sole purpose for the closing was to reduce economic loss, and that the employer's decision was based on a factor over which the union had no control or authority. The Court was careful to clarify that its holding was limited to the particular situation presented and was not intended to cover other types of management decisions, such as "plant relocations, sales, other kinds of subcontracting, automation, etc., which are to be considered on their particular facts." Id. at 686 fn. 22.

Accordingly, the Court concluded that the employer's bargaining obligation was limited to bargaining over the effects of the decision, "in a meaningful manner and at a meaningful time." Id. at 681–682.

In *Dubuque Packing Co.*, 303 NLRB 386, 390–391 (1991), the Board harmonized the differing results in *Fibreboard* and *First National* in the context of an employer's relocating unit work from one of its plants to another of its plants. The Board noted that in *First National*, the employer did not replace its employees or move its operation elsewhere, whereas in *Fibreboard*, the employer replaced existing employees with those of an independent contractor (at its facility). In *First National*, the employer made a decision whether to be in business at all, whereas in *Fibreboard*, the employer's decision did not change the company's basic operation. Finally, in *First National*, the decision was based on the amount of customer payment, whereas in *Fibreboard*, reduction of labor costs was the core reason for the decision to subcontract.

In *Torrington Industries*, 307 NLRB 809, 810 (1992), the Board did not apply the burden-shifting test set out in *Dubuque Packing* to a layoff of unit employees and their replacement with a nonunit employee and independent contractors at the respondent's facility. Rather, the Board applied *Fibreboard* when the employer replaces employees in the existing bargaining unit with those of a contractor to perform the same work and "virtually all that is changed through the subcontracting is the identity of the employees doing the work." Id. at 811. See also *Mi Pueblo Foods*, 360 NLRB No. 116, slip op. at 3 (2014).

As the Board recognized in *Bob's Big Boy Family Restaurants*, 264 NLRB 1369, 1370 (1982) (footnotes omitted), "The distinction between subcontracting and partial closing . . . is not always readily apparent," and, accordingly,

> [I]t is incumbent on the Board to review the particular facts presented in each case to determine whether the employer's action involves an aspect of the employer/employee relationship that is amenable to resolution through bargaining with the union since it involves issues "particularly suitable for resolution within the collective bargaining framework." If so, Respondent will be required to bargain over the decision. If, however, the employer's action is one that is not suitable for resolution through collective bargaining because it represents "a significant change in operations," or a decision lying at "the very core of entrepreneurial control," the decision will not fall within the scope of the employer's mandatory bargaining obligation.

Factors to be examined are the nature of the employer's business before and after the action taken, the extent of capital expenditures, the bases for the action, and, in general, the ability of the union to engage in meaningful bargaining in view of the employer's situation and objectives. Ibid.

In that case, the respondent had completely phased out its shrimp processing operation (one department out of five) at the facility in question, sold the department's machines to Fishking, and returned other machines to the lessor. The Board, in finding that this constituted subcontracting rather than a partial closing, noted at the outset that:

> Respondent did not engage in what can be objectively termed a major shift in the direction of the Company. Both before and after the subcontract, Respondent engaged in the business of providing prepared foodstuffs to its various stores. Indeed, it appears that *Respondent still supplies processed shrimp to its constituent restaurants*. The only difference is that the processing work is now performed by Fishking employees pursuant to the subcontract rather than by Respondent's employees. Accordingly, the nature and direction of Respondent's business was not substantially altered by the subcontract.

Id. at 1371 (footnotes omitted; emphasis in original). Secondly, the Board noted that when the subcontracting arrangement became operative, the respondent was not required to engage in any substantial capital restructuring or investment, that the plant area devoted to shrimp processing remained part of the respondent's facility, and that the respondent retained substantial ownership of the equipment that had been used in shrimp processing. Ibid.

Accordingly, the Board concluded that the respondent's decision to subcontract its shrimp processing operation did not represent a substantial change in the nature or direction of the respondent's business and did not otherwise entail sufficient

capital restructuring to remove the decision from the scope of its mandatory bargaining obligation.

In *O.G.S. Technologies, Inc*., 356 NLRB 642, 645, (2011), the Board engaged in a similar analysis in concluding that the respondent's termination of a portion of it operation constituted subcontracting that required bargaining over both the decision and its effects, concluding:

> In contrast to *First National Maintenance*, OGS made certain operational changes, but they did not amount to a 'partial closing' or other 'change in the scope and direction of the enterprise,' which remained devoted to the manufacture and sale of brass buttons to the same range of customers. Before and after the decision to subcontract die cutting, OGS produced and supplied brass buttons to customers. . . . The decision at issue simply resulted in a marginal increase in the percentage of cutting work the Respondent subcontracted and a modest change in the functions performed in-house, but not the abandonment of a line of business or even the contraction of the existing business.

See also *Chemical Solvents, Inc.*, 362 NLRB No. 164, slip op. at 7 (2015) (outsourcing of trucking operation at facility was appropriately classified as subcontracting, a mandatory subject of bargaining).

The core question, then, is whether the nature and direction of Respondent's business was substantially altered by its contract with Alpla. If so, then the change in operation is more appropriately treated as a partial closing that comes under *First National,* rather than as a subcontract situation under *Fibreboard.* The Respondent argues (R. Br. 19–20) that it is no longer a manufacturer but a reseller and that it has no control whatsoever over the Alpla employees who now operate the machines. On the contrary, the General Counsel contends (GC Br. at 18) that the Respondent's basic operation continues unchanged, except for the fact that Alpla is providing the labor, and that the Respondent remains in the business of producing and supplying plastic bottles and containers that are sold to the same customers as in the past.

The Respondent did not go out of business or even completely close its operation at the facility. Thus, even today, some injection-mold products are transported from Alpla, stored in the facility warehouse, and picked up there by customers. Prior to Mach 31, bargaining unit employees moved product inside the facility, and some of this work continues today.

The Respondent is not totally divorced from the production process of injection-mold products at Alpla. Thus, the Respondent still owns the injection-mold machinery and molds, and provides Alpla with the raw material for those products. Alpla prepares and submits to the Respondent quality control records and reports, and a reasonable number of samples from each production run of products for quality purposes. The Respondent is given the right, upon reasonable notice, to send one or more of its employees to observe and inspect the manufacturing, warehousing and other facilities that Alpla uses to produce, package, store and ship products, and Carvajal did this four times during the past year. The Respondent therefore maintains some oversight authority over the manufacturing process and, consequently, Alpla does not have unfettered sole control.

Moreover, the Respondent still sells injection-mold products (with the Respondent's name and logo) directly to customers that it supplied prior to the subcontracting. In sum, the Respondent has not closed the injection-mold portion of its operation but rather transferred the production to Alpla.

As far as the blow-mold side of the operation, no production has occurred at the facility (other than during 2 weeks in 2015), but the Respondent does purchase some blow-molded products from Alpla and resells them to customers that it had before March 31. One of the five blow-mold machines has been sold; the other four are still maintained at the facility and remain for sale. The Respondent continues to advertise itself as a supplier of both injection-molded and blow-molded products. Finally, the Respondent engaged in no capital restructuring.

Based on the totality of circumstances above, I conclude that despite changes in the production situs and in the employer of the employees who produce the products, the nature of the Respondent's business, including many of its types of products and its customers, remained substantially unchanged. Thus, the nature of the change in the operation was a subcontracting situation, not a partial plant closure. Even if there was a partial closure (of the blow-mold operation), bargaining unit employees worked interchangeably with blow-molded and injection-molded products, and bifurcating the two operations in terms of the bargaining obligation would be infeasible and unworkable.

The Respondent points out that its labor costs in 2014–2015 were a little over $360,000, whereas its net losses were over $900,000, and argues that no amount of concessions from the Union would have made any difference in the decision to contract with Alpla. Carvajal testified to this effect. However, in *Pertec Computer Corp.*, 284 NLRB 810, 810 at fn. 3 (1987), decision supplemented 298 NLRB 609 (1990), enfd. in relevant part sub nom. *Olivetti Office U.S.A., Inc. v. NLRB*, 926 F.2d 181 (2d Cir. 1991), cert. denied 502 U.S. 856 (1991), the Board discounted the bare assertion that bargaining over the decision to relocate and subcontract unit work would be pointless because the union would never agree to wage cuts substantial enough to make reversal of the decision economically sound:

> Indeed, to conclude in advance of bargaining that no agreement is possible is the antithesis of the Act's objective of channeling differences, however profound, into a process that promises at least the hope of mutual agreement. See *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970). On the other hand, once bargaining to impasse has occurred, the futility of continuing is clear. Also see *NLRB v. Katz*, 369 U.S. 736 (1962).

See also *Geiger Ready-Mix Co. of Kansas City*, 315 NLRB 1021, 1032 (1994) ("[a]n employer must offer something more than a self-serving assertion that there was nothing the bargaining agent of its unionized employees could do to change its mind.").

Nor has the Respondent shown that bargaining to impasse or agreement over the decision would have jeopardized its business in any way. *Pertec Computer Corp.*, above at 811; see also *Olivetti Office U.S.A. v. NLRB,* above at 186. In this regard, such negotiations would not necessarily have threatened

the Respondent's confidentiality concerns during its negotiations with Alpla. The Union presumably would have had the opportunity to provide suggestions on ways to reduce the Respondent's cost of conducting business at the facility using unit employees, not to have been made privy to the details of proposed contractual arrangements between the Respondent and Alpla. To assume that the Union would have breached the Respondent's confidentiality concerns is as unwarranted as assuming bargaining over the decision would have been futile. See *Pertec Computer*, ibid. (disclosure of information ordered where the respondent had not shown the union to be unreliable in respecting confidentiality agreements); see also *People Care, Inc.*, 299 NLRB 875, 875–876 (1990).

Accordingly, I conclude that the Respondent was obliged to engage in bargaining over the decision to contract out unit work with Alpla and lay off unit employees.

Effects Bargaining

Even if the Respondent had not been obliged to bargain over the decision to subcontract, it nonetheless remained obligated to bargain over the effects of the decision "in a meaningful manner and at a meaningful time." *First National*, above, at 681–682; *Miami Rivet of Puerto Rico*, 318 NLRB 769, 772 (1995). As the Board stated in *Allison Corp.*, 330 NLRB 1363, 1365 fn. 14 (2000), "Effects bargaining can include such topics as layoffs, severance pay, health insurance coverage and conversion rights, preferential hiring at other of the employer's operations, and reference letters for jobs with other employers."

Effects bargaining must occur sufficiently before actual implementation of the decision so that the union is not presented with a fait accompli. *Komatsu America Corp.*, 342 NLRB 649, 649 (2004); *Woodland Clinic*, 331 NLRB 735, 738 (2000). Relevant to this determination is whether the union is afforded an opportunity to bargain at a time when it still represents employees upon whom the company relies for services, thus allowing the union to retain some measure of bargaining power. *Komatsu America Corp.,* ibid; *Metropolitan Teletronics Corp.,* 279 NLRB 957, 959 (1986), enfd. mem. 819 F.2d 1130 (2d Cir. 1987).

The Respondent avers that it met its obligation to engage in effects bargaining (R. Br. 22–23). The General Counsel contends that the timing of the Respondent's notification to the Union, as well as Carvajal's misleading the Union about postlayoff labor needs, precluded any meaningful effects bargaining (GC Br. 27–28). I agree with the General Counsel for the following reasons.

The Respondent executed its contract with Alpla on February12 yet Carvajal admittedly did not tell the Union of the plant closure until March 17, over a month later and less than 2 weeks before the last working day of unit employees. Carvajal testified that it took him about 2 weeks after February 12 to arrive at an exact closing date, but at the time he signed the Alpla agreement, he certainly must already have contemplated a general time frame for the closing. I would expect this of an experienced business person such as Carvajal.

Carvajal's telling Rodriguez on March 9 that it was "urgent" that they meet failed to amount to valid notice of the shutdown. In *Penntech Papers, Inc.*, 706 F.2d 18, 27 (1st Cir. 1983), the First Circuit Court of Appeals rejected the respondents' argument that the unions were put on notice of a possible shutdown when a management representative made "an oblique reference to a possible closure," instead finding that "a vague remark cannot pass for 'reasonable notice' of a shutdown as mandated by the Act." Carvajal's remark was wholly ambiguous and gave absolutely no hint of a shutdown.

Carvajal's asserted reason for not disclosing the impending shutdown to Rodriguez on March 9—confidentiality concerns—also fails as a valid defense. Indeed, in *Williamette Tug & Barge Co.*, 300 NLRB 282, 282–283 (1990) (footnotes omitted), the Board recognized an employer's need for confidentiality during negotiations to sell a business but concluded that such a legitimate concern "does not obviate the employer's duty to give pre-implementation notice to the union to allow time for effects bargaining, provision for which may be negotiated in the sales agreement." The Board went on to hold that:

> [B]arring particularly unusual or emergency circumstances, the union's right to discuss with the employer how the impact of the sale on the employees can be ameliorated must be reckoned with . . . sufficiently before its actual implementation so that the union is not confronted at the bargaining table with a sale that is a fait accompli.

Id. at 283. See also *Pertec Computer Corp.*, above; *People Care, Inc.,* above.

In *Williamette Tug*, the Board stated that same-day notice is "clearly insufficient" but did not determine "exactly how many days' notice" would be adequate. Id. at 283; see also *Compact Video Services, Inc.,* 319 NLRB 131, 131 fn. 1 (1995) (the Board specifically declined to pass on the judge's conclusion that notice had to be given by the date on which the sales contract was executed). See also *Pertec Computer Corp.*, supra; *People Care, Inc.,* supra. The Respondent has not contended any unusual or emergency circumstances.

Accordingly, I conclude that the Respondent did not have good reason to wait until March 17 to notify the Union of the plant closure and the layoff of unit employees, thereby depriving the Union of more time to negotiate the effects thereof. The Union could have been more assertive in negotiating, but I cannot say that the result would have been the same had the Union been notified earlier and had more time to talk with employees, formulate proposals, and bargain over them with the Respondent.

On March 26, Rosario asked if the shutdown would be total or partial, to which Carvajal replied that it was total, and even the official clerical employees were going to be let go. However, it is undisputed that Carvajal had Laser employees perform unit work at the facility the weeks ending April 9 and May 3, for a total of 347 hours. Some of them produced both injection containers and mold bottles, and some of them loaded trailers. Merchandise was also moved in the warehouse after March 31. Thus, contrary to what Carvajal represented, unit work was in fact performed at the facility after all of the unit employees were laid off.

The Respondent (R. Br. 23–24) contends that the Union waived its right to bargain about the postclosing warehouse work related to moving merchandise produced prior to the clos-

ing. Crediting Carvajal, the Union mentioned nothing about this during effects bargaining even though, the Respondent argues, the Union had to know that there would be leftover merchandise that would have to be moved and loaded into trailers.

Waiver of a right to bargain must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 708 (1983); *Allison Corp.*, above at 1365 ("[I]t must be shown that the matter claimed to have been waived was fully discussed by the parties and that the party alleged to have waived its rights consciously yielded its interest in the matter."). See also *Provena St. Joseph Medical Center,* 350 NLRB 808, 810 et seq. (2007). If the matter of the above work was not even mentioned during effects bargaining, then ipso facto it could not have been "fully discussed," and the Union could not have "consciously yielded its interest." Accordingly, I conclude that there was no such waiver.

For the above reasons, I further conclude that the Respondent failed to meet its obligation to bargain over the effects of the contracting out of unit work and layoff of unit employees.

Nonunit Employees Performing Unit Work at the Facility after March 31

Assignment of work is a mandatory subject of bargaining. *WCCO-TV,* 362 NLRB No. 101, slip op. at 2 (2015); *Regal Cinemas, Inc.*, 334 NLRB 304, 304 (2001), enfd. 317 F.3d 300 (D.C. Cir. 2003) (2003). Thus, an employer violates the Act by reassigning work performed by bargaining unit employees to supervisors or other individuals outside the unit without providing the collective-bargaining representative notice and an opportunity to bargain. *St. George Warehouse, Inc.*, 341 NLRB 904, 904–906, 924 (2004), enfd. 420 F.3d 294 (3d Cir. 2005); *Stevens International*, *Inc.,* 337 NLRB 143, 143 (2001); *Regal Cinemas, Inc.*, above. This obligation is not lessened because the transfer is motivated by economic considerations. *Talbert Mfg., Inc.*, 264 NLRB 1051, 1056 (1982).

Following the layoffs of all unit employees, the Respondent used employees of Laser and former supervisor Mojica to move leftover product in the warehouse. Laser employees performed production work at the facility during the weeks of April 9 and May 3. Carvajal did not have the prerogative of deciding for the laid off employees that they would not want to work a small number of hours, but should have given them the opportunity to make their own decisions. Currently, three Laser employees, including Mojica, at the facility handle injection-mold products that are manufactured by Alpla for the Company and delivered for pickup by small customers.

The Respondent does not dispute that all of the above work was performed by bargaining-unit employees prior to March 31 and that the Union was never afforded advance notice that any of it would be performed by nonbargaining-unit employees.

Accordingly, I conclude that the Respondent violated Section 8(a)(5) and (1) by transferring bargaining unit work to Laser employees and former supervisor Mojica without providing the Union with notice and an opportunity to bargain.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2.By the following conduct, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(5) and (1) of the Act:

(a) Laid off all unit employees on March 31, 2015, without having afforded the Union adequate notice and an opportunity to meaningfully bargain over the decision to subcontract unit work and the effects of that decision.

(b) Thereafter transferred bargaining unit work at the facility to nonunit employees without providing the Union with notice and an opportunity to bargain.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The General Counsel argues that the appropriate remedy would be an order directing the Respondent to restore the status quo ante. I do not deem such remedy suitable here. As in *Bob's Big Boy Family Restaurant*, supra, where the Board declined to order such a remedy, it is clear that the Respondent subcontracted its operation for nondiscriminatory economic and related business reasons. The Respondent was in serious financial trouble prior to the March 31 layoffs, has a firmly-established contractual relationship with Alpla; has transferred the entire production operation to Alpla, has gone to the expense of moving injection-mold equipment to Alpla; and has already sold one of the blow-mold machines. This is not a case where only one department or portion of a facility has been closed, or only some of the unit employees have been laid off, in which event restoration would be relatively simple. In these circumstances, I am "reluctant to compel Respondent to restore its previous operation and modify its production one or more times depending upon the results of its bargaining with the Union." Id. at 1372. In sum, ordering restoration of the status quo ante would place an unreasonable hardship on the Respondent and possibly jeopardize its contract with Alpla, potentially throwing its entire operation into chaos and resulting in great financial detriment to the Company without any benefit to unit employees.[22]

The General Counsel contends, in the alternative, that I should order a *Transmarine*[23] remedy, and I agree that "effectuation of the purposes and policies of the Act requires that the discharged employees be 'reimbursed for such losses until such times as the Respondent remedies its violation[s] by doing what it should have done in the first place.'" Ibid, citing *Winn-Dixie Stores*, 147 NLRB 788, 792 (1964).

Accordingly, I order the Respondent to bargain with the Union about the decision to subcontract unit work to Alpla, and its effects. I further order the Respondent to pay employees who were laid off on March 31 their normal wages when in the Re-

[22] I recognize that Carvajal has related business interests (i.e., Laser and possibly other companies), but the General Counsel has not alleged any alter ego relationships that might bear on this analysis and lead to a contrary conclusion, and I will not engage in speculation over Carvajal's overall financial situation.

[23] *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

spondent's employ from 5 days after the date of this decision until the occurrence of the earliest of the following conditions: (1) the Respondent bargains to agreement with the Union about the decision to subcontract unit work to Alpla, and the effects thereof; (2) the parties reach a bona fide impasse in bargaining; (3) the Union fails to request bargaining within 5 days after the receipt of this decision, or to commence negotiations within 5 days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the Union subsequently fails to bargain in good faith. In no event shall the sum paid to any of the employees exceed the amount he or she would have earned as wages from the date the employee was laid off to the time he or she secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner. However, in no event shall this sum be less than the employee would have earned for a 2-week period at the rate of his or her normal wages when last in the Respondent's employ. Backpay shall be based on the earnings that the employees would normally have received during the applicable period, less any interim net earnings, and shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In addition, the Respondent shall compensate employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years. See *Advoserv of New Jersey, Inc.*, 363 NLRB No. 143 (2016); *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014).

The General Counsel also seeks an order requiring the Respondent to reimburse the laid off employees for search-for-work and work-related expenses that they have incurred while searching for work regardless of whether they received interim earnings for a particular quarter. Those employees are entitled to reimbursement for expenses incurred in their search for interim employment, but at present the Board treats such expenses as an offset to an employee's interim earnings rather than calculating them separately. *West Texas Utilities Co.*, 109 NLRB 936, 939 fn. 3 (1954). I am obliged to follow existing Board precendent. See *Pathmark Stores, Inc.*, 342 NLRB 378, 378 fn. 1 (2004); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984). Therefore, I must deny the General Counsel's request for this additional remedy.

The General Counsel has also requested that, along with a *Transmarine* remedy, I order that unit employees be made whole for later unit work performed by nonunit employees. However, but for the Respondent's agreement with Alpla and the elimination of all production at the facility, this would not have occurred. As such, the violation appears to be subsumed within the violation of failing to bargain over the decision to subcontract to Alpla, and the effects thereof.

I order that the appropriate notice be posted in Spanish and English.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[24]

ORDER

The Respondent, Rigid Pak Corp., Juncos, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off unit employees and subcontracting their work without first affording the Union de Tronquistas de Puerto Rico, Local 901, International Brotherhood of Teamsters (the Union) adequate notice and an opportunity to bargain over the decision to subcontract the work, and its effects.

(b) Transferring bargaining unit work at the facility to nonunit employees without first affording the Union adequate notice and an opportunity to bargain.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Bargain, on request, with the Union about the decision to subcontract unit work to Alpla, and its effects.

(b) Bargain, on request, with the Union about using nonunit employees to perform bargaining unit work at the facility.

(c) Pay employees who were laid off on March 31 in the manner set forth in the remedy section of this decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Juncos, Puerto Rico, copies of the attached notice marked "Appendix,"[25] in Spanish and English. Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the

[24] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[25] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Respondent at any time since March 31, 2015.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 8, 2016

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

An employer subject to the National Labor Relations Act must collectively bargain with the labor organization that represents its employees concerning wages, hours, and working conditions.

The Union de Tronquistas de Puerto Rico, Local 901, International Brotherhood of Teamsters (the Union) represents a unit of our production and maintenance employees.

WE WILL NOT subcontract unit work and lay you off without first affording the Union adequate notice and an opportunity to bargain over the decision to subcontract the work, and its effects on you.

WE WILL NOT transfer unit work at our facility to nonunit employees without first affording the Union adequate notice and an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the Act, as set forth at the top of this notice.

WE WILL, on request, bargain in good faith with the Union about our decision to subcontract unit work to Alpla Caribe, Inc., and its effects on you.

WE WILL, on request, bargain in good faith with the Union about our using nonunit employees to perform unit work at our facility.

WE WILL pay you in the manner set forth in the remedy section of this decision.

RIDIG PAK CORP.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/12-CA-152811 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.